Case No. 1120465

IN THE SUPREME COURT OF ALABAMA

HUGH MCINNISH, et al.,
Appellants

v.

BETH CHAPMAN, SECRETARY OF STATE
Appellees.

APPEAL FROM THE
CIRCUIT COURT OF MONTGOMERY COUNTY
CV 2012-1053

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rules 28(a)(1) and 34(a), Ala. R. App. P.,

ORAL ARGUMENT IS REQUESTED

Appellants Hugh McInnish and Virgil Goode request oral argument in this case following the erroneous ruling of the Circuit Court. This case involves the important question of whether the Alabama Secretary of State has a duty to investigate a presidential candidate's qualifications, when credible evidence and information from an official source has been presented that indicates the candidate may not be qualified for office.

The Secretary has an affirmative duty that stems from her oath of office under both the U.S. and Alabama Constitutions, to protect the citizens from fraud and other misconduct by candidates. After being presented with evidence from an official source, the Secretary has refused to investigate the qualifications of candidates for President of the United States. As a result of her inaction, a person believed to be unqualified for that office has been elected. As the chief election official for the State of Alabama, the Secretary is the responsible person with the duty to prevent ineligible names from appearing on the ballot.

Ala. Code §17-16-44, the Jurisdiction-Stripping statute,

does not apply to this case since Appellants are not asking the Court to ascertain the "legality, conduct, or results of an election," but rather to ascertain the authority to verify eligibility of candidates for president; There is no statute which prohibits the Secretary from performing her duty.

The fact that this issue was not resolved before the election does not moot the question, because the possibility is present for this issue to be "capable of repetition yet evading review". Since elections happen every year, and presidential elections occur every four years, the potential harm could occur in any election cycle, not just the election just past. The decision of the Circuit Court is erroneous as a matter of law. The Secretary of State is required and authorized by law to act to protect the citizens of this state in all election matters. Plaintiffs believe that the Secretary of State should be ordered to verify the qualifications for all the presidential candidates in the 2012 election, and that oral argument would aid this Court's decision in this case.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Ala. Code § 12-2-7(1) which grants the Alabama Supreme Court jurisdiction to hear appeals. This case is an appeal from the Circuit Court of Montgomery County, Alabama.

TABLE OF AUTHORITIES

Cases

Statutes And Other Legislative Authority

Other Authorities

STATEMENT OF THE CASE

This case is a direct appeal from a judgment of dismissal with prejudice entered by the Montgomery Circuit Court.

This case is before this Court on appeal from an order by the Montgomery Circuit Court denying Hugh McInnish's and Virgil Goode's petition for a Writ of Mandamus or Other Appropriate Extraordinary Relief. Such petition is directed to Beth Chapman, in her official capacity as the Alabama Secretary of State. The Prayer for Relief in the petition requested that the Court order the Secretary of State to demand that all candidates for the Office of President of the United States to cause a certified copy of their bona fide birth certificate to be delivered to the Secretary directly from the government official in charge of the record depository in which it is stored, and to make the receipt of such a prerequisite to their name being placed on the Alabama ballot for the November 6, 2012 general election. To issue a preliminary and permanent injunction preventing the placement on the 2012 Alabama ballot until their eligibility had been conclusively determined.

The Court below held, in error, that the Secretary's Motion to Dismiss was granted.

Timeline of the Case

February 2, 2012: McInnish together with his attorney and others visited the Office of the Secretary of State, at which the Hon. Emily Thompson, Deputy Secretary of State, speaking in the absence of and for the Secretary of State, represented that her office would not investigate the legitimacy of any candidate, thus violating her duties under the U.S. and Alabama Constitutions.

October 11, 2012: McInnish and Goode filed suit in the Circuit Court of Montgomery County. This case was assigned to the Honorable Eugene W. Reese.

October 12, 2012: McInnish and Goode filed a motion for summary judgment and a motion to shorten response time to 5 days, as time was of the essence to get a decision before the November 6, 2012 presidential election.

October 18, 2012: The Secretary of State filed her motion to dismiss, which McInnish and Goode fully opposed.

October 31, 2012: McInnish and Goode filed a motion for status conference since time was of the essence, the

election was upcoming on November 6, 2012 and this case was not resolved.

November 10, 2012: McInnish and Goode filed a Praecipe, since this lawsuit is of great importance, as Obama had "won" the election and law and equity require that this case should be decided at least before the electors vote on December 17, 2012.

November 20, 2010: The Secretary filed her renewed motion to dismiss, which McInnish and Goode also opposed.

December 6, 2012: A hearing was held before the Court. On the same day, Judge Reese, in a one-sentence order, dismissed the case with prejudice. No explanation for the dismissal was given.

January 17, 2013: Appellants filed a timely notice of appeal to this Court.

STATEMENT OF THE ISSUES

The issues for appeal are as follows:

1. Whether under the exceptions to the mootness doctrine this case is ripe for review, even though the election about which it revolves is past.

2. Whether the Secretary of State has a duty to investigate a candidate's qualifications when credible evidence and information from an official source has been presented that indicates the candidate may not be qualified for Office.

STATEMENT OF THE FACTS

On or about April 2011,after 2 years into his presidency, and under media and political pressure, Barack Obama published on the internet an electronic version of a purported birth certificate alleging his birth in Honolulu, Hawaii on August 4, 1961 to American citizen mother, Stanley Ann Dunham, and Kenyan British subject father, Barack Obama, Sr. This was the so-called "long-form" birth certificate. Verified Compl. §6. (C8)

No physical, paper copy of the actual long form birth certificate has been produced in order to definitively establish OBAMA's birth within the United States. Verified Compl.¶ 8. (C8) Instead, there is credible evidence that the "birth certificate" published on the internet was altered or otherwise fraudulent.

On February 2, 2012, McInnish, together with his attorney and others, visited the Office of the Secretary of State, at which time the Hon. Emily Thompson, Deputy Secretary of State, speaking in the absence of and on behalf of the Secretary of State, represented to McInnish that her office would not investigate the eligibility of

any candidate, thus violating her duties under the U.S. and Alabama Constitutions. Verified Compl. § 13. (C9)

On October 11, 2012 McInnish and Goode filed suit in the Circuit Court of Montgomery County seeking to have a writ of mandamus issued to the Alabama Secretary of State compelling her to demand from all candidates whose names had been submitted to her for inclusion on the ballot in Alabama, for the Office of President of the United States, a bone fide birth certificate. Such birth certificate shall be delivered to the Secretary of State directly from the government official who was in charge of the records depository in which it was stored.

STATEMENT OF THE STANDARD OF REVIEW

"Questions of law are reviewed de novo." *Alabama Republican Party v. McGinley*, 893 So. 2d 337, 342 (Ala. 2004).

SUMMARY OF THE ARGUMENT

Because the length of time required to receive a resolution of election matters in the courts far exceeds the amount of time required for an election to be held, results to tabulated, and the swearing in of a new office holder, it does not fall under the traditional criteria for mootness. We in the United States cherish our right to vote more than anything and hold elections at least every two years. Resolution of this matter must still occur and this case is not moot because it is "capable of repetition yet evading review."

In addition, the Secretary of State of Alabama, as the chief elections officer for the state, has an affirmative duty under her oath of office to support both the Alabama and U.S. Constitutions to investigate the eligibility of those who wish to have their names appear on the presidential election ballots. A writ of mandamus must respectfully be issued requiring the Secretary of State to perform her duties owed to the citizens of the State of Alabama and to her duties to her oath of office under both the Alabama and U.S. Constitutions.

ARGUMENT

INTRODUCTION

A gnawing question vexes the Alabama body politic and indeed the entire country: Is Barack Hussein Obama, the man ensconced in the White House, the Commander in Chief of our armed forces, the traditional leader of the Free World, constitutionally qualified to occupy this high office? Or is he a "pretender to the throne," one who has arrived at his high position by fraud and deceit? There is compelling evidence that the truth lies with the latter.

The U.S. Constitution requires that a President be a "natural-born" citizen. U. S. Constitution, Article II, Sec. 1, Cl. 5. Although the U.S. Constitution does not define natural-born citizen, it is certainly distinct from a mere "citizen," and it is usually taken to mean a person born on American soil of parents both of whom are at least citizens, not necessarily natural-born citizens themselves. The core question regarding Obama is whether he is a natural-born citizen. That is, whether he meets the minimum requirements for the office of President as mandated by Article II, Sec. 1, Cl. 5 of the Constitution.

In an effort to resolve this persistent question Mr. Obama has produced and offered to the public two purported birth certificates, called the short-form certificate and the long-form certificate. However detailed examination of these documents by experts has shown glaring anomalies which point to the strong suspicion that both are computer-generated forgeries.

This suit asks this Court to resolve this critically important question by issuing a writ of mandamus to the Alabama Secretary of State directing her to require all presidential candidates in the recent 2012 election to submit *bona fide* birth certificates to her for verification.

The fact that the election is past does not obviate the question, nor as we explain infra does it render it moot.

Answers to Defendant's Renewed Motion to Dismiss

The court below gave no hint of its rationale for dismissing the case. We, therefore, are left with the assumption that he concurred with some or all of the averments in Chapman's motion to dismiss. We will, accordingly, address these points in turn.

Chapman first asked that our case be dismissed on the grounds of mootness.

In support of her motion she cited the case of *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 70-71 (Ala.2010), quoting *Cnty. Of Los Angeles v. Davis*, 440 U. S. 625, 631 (1979).

In *Barber*, the case involved the seizure by state authorities of slot machines used in an allegedly illegal gambling operation in Lowndes County. The Court first addressed the question of mootness, which the defendants had alleged. The Court observed that the operators had, in a sense, agreed not to use further the machines seized, but had not agreed to refrain from using the machines that had not been seized, and that, further, there was no assurance that the operators would not procure and operate new machines. Therefore *Barber* was held not moot. Since this was a case of non-mootness, it does not support Chapman's claim that the present case is moot.

Chapman also cited *Bell v. Eagerton*, 908 So 2d 204 (Ala. 2002). *Bell* involved a case in which a person was disqualified as a candidate for circuit judge in Lowndes County. The case was judged to be moot since Bell did not

take the proper legal actions. Specifically he failed to seek an injunction to stop the election in which he wished to be a candidate, and did not contest the election after it was held. The suit did not involve the legitimacy of the would-be candidate, and is not relevant to the present case.

In the unlikely event that this Court considers the present case moot, it nevertheless falls under the exceptions to the mootness doctrine. The exceptions are recognized by many, if not most states, and is stated with special clarity in *Coady v. Pennsylvania Board of Probation and Parole*, which reads in part as follows:

> This court will decide questions that have otherwise been rendered moot when one or more of the following three exceptions apply: (1) the case involves questions of great public importance; (2) the conduct complained of is capable of repetition yet avoiding review; or (3) a party to the controversy will suffer some detriment without the court's decision. *Coady v. Pennsylvania Board of Probation and Parole*, The Commonwealth Court of Pennsylvania, No. 598 M. D. 2001, "an unreported single-judge 'Memorandum Opinion"'

The presence of any one of these three factors is sufficient to defeat a mootness claim, as shown in the following examples:

Exception 1, Questions of great public importance, *Coady v. Pennsylvania Board of Probation and Parole,* Commonwealth Court of Pennsylvania No. 598 M. D. 2001;

Exception 2, Capable of repetition but evading review, *Moore v. Ogilvie,* 394 U.S. 814.

Exception 3, A party would suffer a detriment, *In re: Stephen J.,* Appellate Court of Illinois, Second District, No. 2-09-0472.

The present case falls under each of the three named exceptions, and therefore is not moot:

Exception 1: The present case involves a question of extreme public importance. It goes to the question of whether the citizenry are to be protected against fraud and dishonesty in their elections. It goes to the very heart of our self government.

Exception 2: The complaint here is that the legitimacy of the candidates, where the legitimacy of at least one has been determined to be in serious doubt, is without any question a complaint that can, and probably will recur. Moreover, we need look no further than the this present case to conclude that it is impracticable to adjudicate such cases between the time names are submitted to the

Secretary of State and the election is held.

As is true by analogy in this case, every contest of an election would similarly be mooted by the sheer length of a trial and appeals process. Yet elections happen every year and the potential for harm is just as present in the next election cycle. Thus the conduct complained of is capable of repetition, yet avoiding review.

Exception 3: Without a decision of the court, McInnish and Goode will suffer a direct detriment in that as citizens they will have been deprived of the assurance that their election was honest, and that only votes of legitimate candidates were counted and recorded. Goode, himself a presidential candidate, should be assured that he was not competing with an ineligible candidate.

The classic and best known case of application of these rules to reach a decision on nonmootnes is that of *Roe v. Wade* in which Justice Blackmun, writing for the majority, said in part:

> The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated, *United States v. Munsingwear*, Inc., 340 U.S. 36 1950); *Golden v. Zwickler*, 394 U.S. 102 (1969); *SEC v. Medical committee for Human Rights*, 404 U.S. 403 (1972).

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. lf that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review" *Roe v. Wade*, 410 U.S. 113, 166 (1973).

In *Roe* the pregnant Jane Roe was suing the District Attorney of Dallas County, Texas claiming she had a right to an abortion, the Texas law outlawing abortion not withstanding. Roe had her baby long before the case reached the Supreme Court, and in an ordinary case it would be moot. It was obviously too late for the court to grant her relief. But, as seen above, the court applied the mootness exceptions and heard the case.

In Alabama, the case of *Allen v. Bennett* (Appendix B) is particularly instructive, since it involves the Secretary of State and an election that is past. Allen claimed that Secretary of State Jim Bennett erroneously left him off the ballot for circuit judge in the November 2000 general election. It was argued that the case was moot because the election was over. But the Supreme Court disagreed and

said:

> However *because the outcome of this case could impact future elections*, we hold that... this case is not moot. (Italics added.) *Allen v. Bennett*, 823 So.2d 679 (Alabama 2001)

As is true by analogy in this case, every contest of an election would similarly be mooted by the sheer length of a trial and appeals process. Yet elections happen every year and the potential for harm is just as present in the next election cycle. It has thus become the case law in Alabama that election issues will not become moot simply because an election has passed.

For the reasons discussed *supra*, this case is not moot as it qualifies under valid exceptions to the mootness doctrine.

Next, Chapman argued five additional reasons that this case should be dismissed. We shall address each of these in turn:

1. The Secretary of State has no legal duty to investigate the qualifications of a candidate.

The Secretary of State is the "chief elections official in the state and shall provide uniform guidance for election activities" (Code of Ala. § 17-1-3(a)). The Secretary of State's duties under Alabama law do not

provide an excuse for her inaction, as she seems to argue. If absolute compulsion in the form of "legal duty" were the only criterion for a person performing her duty, especially in the case of an elected official, corruption would be rampant, and our whole society might well grind to a halt. The fact that she has "no legal duty" to do a thing certainly does not prevent her doing a thing when, as here, it is the right thing to do.

Chapman cited Attorney General's Opinion No. 1998-200. (Appendix A) Contrary to the Secretary of State's argument, this Attorney General's opinion strongly supports the need to determine the legitimacy of at least one of the presidential candidates when the Secretary of State has been notified that there is a serious question of that candidate's eligibility for office. The opinion states in part:

> If the Secretary of State has knowledge gained from an official source arising from the performance of duties prescribed by law that a candidate has not met a certifying qualification, the Secretary of State should not certify the candidate. Attorney General's Opinion No. 1998-200, under the heading of CONCLUSION.

The Secretary of State had gained knowledge from an official source that there was probable cause to believe

that Barack Obama had not met a certifying qualification. Joseph M. Arpaio, Sheriff of Maricopa County Arizona, at the request of a group of Arizona citizens, conducted a months-long investigation into the legitimacy of the "birth certificate" Obama presented to the public as proof of his being a "natural-born" citizen as required by the Constitution to serve as President:

In an affidavit (Appendix D) Sheriff Arpaio stated in part as follows:

> 7. Upon close examination of the evidence, it is my belief that forgery and fraud was likely committed in key identity documents including President Obama's long-form birth certificate, his Selective Service Registration card, and his Social Security number.
>
> 8. My investigators and I believe that President Obama's long-form birth certificate is a computer-generated document, was manufactured electronically, and that it did not originate in a paper format, as claimed by the White House. Most importantly, the "registrar's stamp" in the computer generated document released by the White House and posted on the White House website, may have been imported from another unknown source document. The effect of the stamp not being placed on the document pursuant to state and federal laws means that *there is probable cause that the document is a forgery, and therefore, it cannot be used as a verification, legal or otherwise, of the date, place or circumstances of Barack Obama's birth.* (Italics added. Affidavit of Joseph M. Arpaio, C 19; also Exhibit D)

Further, it is not novel nor uncommon for a Secretary of State to not only investigate the

eligibility of presidential candidates, but to also remove them from the ballot for failure to meet the minimum requirements of eligibility. One such case occurred in 1968 in California, where California Secretary of State Frank M. Jordan determined that Eldridge Cleaver was ineligible to serve as president since he did not meet the minimum age requirement set by the Constitution of 35 years, and refused to put his name on the California, ballot. In a letter issued by the Secretary of State to Jack Weinberg (Chairman, Peace and Freedom Party Central Committee) (Appendix C) he said in part as follows:

> (P)lease be advised that this office will not certify Eldridge Cleaver as the Peace and Freedom candidate for president on the November 5, 1968 general election ballot. Information in our possession indicates ... that Mr. Cleaver is 33 and not 35 years old *which is a requirement under our federal constitution for president*. (Italics added. Letter from Frank M. Jordan to Mr. Jack Weinberg, September 18, 1968, Appendix C.)

Likewise, in 2012, one Peta Lindsay was selected by the Peace and Freedom Party to be its Presidential candidate on the 2012 California primary ballot. Secretary of State Debra Bowen, however, rejected Ms. Lindsay, and refused to place her name on the ballot, because she was 27 years old,

and not eligible under the U.S. Constitution, Article 2, §1, which requires that candidates for President to be at least 35 years of age.

2. In regard to candidates for President, the authority to judge qualifications rests with Congress.

Contrary to this assertion by Chapman, the authority to determine qualification for the office of President of the United States does not rest *exclusively* with Congress, which has no direct statutory or Constitutional means of challenging a Presidential Candidate, or a President-elect. There is no bar to a state official enforcing the United States Constitution. In fact, the Secretary of State has taken an oath explicitly to *support* the United States Constitution. Again, as it is her duty as Alabama chief elections officer, she is required to enforce Alabama Election law as well as the United States Constitutional provisions pertaining to elections, and, as discussed above, certainly for a state official to enforce a Constitutional provision is not unprecedented. *See supra* the California Secretary of State's letter announcing the barring of a candidate for President from the California ballot for failing to meet Constitutional requirements.

3. The Court lacks subject matter jurisdiction over Plaintiffs' claims.

Again, contrary to Chapman's contention, the Court does not lack subject matter jurisdiction. The question presented here is not whether the election was properly conducted, or whether the votes were properly counted and reported. Instead, the question is whether one or more of the Presidential candidates were qualified to have their names placed on the ballot. If, as appears probable, fraud was perpetrated upon the Secretary of State and the citizens of Alabama, this Court certainly has subject matter jurisdiction.

4. Plaintiffs have failed to join necessary parties.

This is a suit merely asking that the Secretary of State do her duty under the Constitution and under Alabama law. While it is true that Barack Obama was specifically mentioned as a candidate that the Secretary of State needed to investigate, Plaintiff's contention applies to the Secretary of State's duties to investigate all presidential candidates. Nevertheless, for President Obama, the Chairman of the Alabama Democrat Party sought to intervene in the initial case, but the lower court did not approve his request. Therefore, Chapman's argument is without merit.

5. Plaintiffs' claim was filed too late.

Since Plaintiffs brought their writ before the 2012 general presidential election took place, it was filed timely. However, even if this Court were to hold that Plaintiffs' writ was untimely for the 2012 election, the contentions are still valid as they apply not only to the 2012 presidential election, but to all future elections as well. Plaintiffs have dealt with this question in their discussion of mootness, supra.

Again, the question of eligibility of candidates will continue to be an issue in future election cycles, and the issue needs to be resolved. Otherwise more suits involving matters capable of repetition yet avoiding review will follow in future elections until this issue is resolved.

Additional important points of the argument

The following additional points are important to this case:

1. This Case Is not Moot and Should Be Decided on its merits.

As discussed *supra*, this case meets each of the three conditions for nonmootness, any one of which is sufficient to render it nonmoot.

Plaintiffs, therefore, respectfully request that this suit move forward and be decided on its merits since, just as in *Roe v. Wade*, a critical question of statewide importance which is presented here is certain to recur, and is in need of a clear answer from this Court. By acting now this Court can prevent confusion in future elections where it may otherwise arise.

2. There Is Credible Evidence of Fraud In Candidate Obama's Purported "Birth Certificate."

There is strong technical evidence of fraud in the birth certificate submitted by Barack Obama. This allegation is substantiated by the affidavits of Sheriff Arpaio of Maricopa County Arizona, and by the leader of his cold case posse, Michael Zullo.

Sheriff Arpaio was first asked to undertake an investigation into Obama's long-form birth certificate in August of 2011 upon petition by 250 residents of Maricopa County. Arpaio Affidavit, § 2 (C38)

The Cold Case Posse was commissioned by Sheriff Arpaio in October, 2011, and was comprised of former law enforcement investigators and practicing attorneys. Zullo Affidavit,§ 5(C35)

Michael Zullo was the lead investigator for the Cold Case Posse and was charged with the task of determining whether the electronic document released by the White House as Barack Obama's birth certificate was, in fact, authentic. Zullo Affidavit,§ 6.(C 35)

In February 2012, the Cold Case Posse informed Sheriff Arpaio that there was likely forgery involved with the documents. § 7. (C36)

Zullo concluded that "the document published on the White House website, is, at minimum, misleading to the public as it has no legal import and cannot be relied on as a legal document verifying the date, place and circumstance of Barack Obama's birth." § 11. (C36)

Zullo's conclusions "were based upon, but not limited to, input from numerous experts in the areas of typesetting, computer generated documents, forensic document analysis and Adobe computer programs, as well as, review of Hawaii state law, Hawaii Department of Health policies and procedures, and comparisons with numerous other birth records." § 7. (C36)

In the course of their investigation, "The investigators also chronicled a series of inconsistent and misleading representations that various Hawaii government officials have made over the past five years regarding what, if any, original birth records are held by the Hawaii Department of Health." § 12 (C37).

Zullo's conclusions were also supported by the sworn affidavit of Jerome Corsi, Ph.D., a journalist and author currently employed as a Senior Staff Reporter by WND.com. Dr. Corsi holds a Ph.D. from Harvard University and has extensively researched OBAMA and his past. Dr. Corsi utilized his extensive research to publish his book "Where's the Birth Certificate: The Case That Barack Obama is Not Eligible to Be President." Corsi Affidavit § 9.(C41)

Dr. Corsi aided the Cold Case Posse's investigation by turning over all the research he conducted to write his book, as well as any subsequent research. § 6. (C40)

At Zullo's request, Dr. Corsi flew to Phoenix, Arizona to meet with the Cold Case Posse and present the evidence he had produced for the book and relevant research he conducted subsequently. §7 Id.

Dr. Corsi's research, both that published and that private, "reveals and shows a likelihood that key identity papers for President Obama have been forged, including his long-form birth certificate released by the White House on April 27, 2011, and his Social Security Number." § 8 Id.

Dr. Corsi similarly concluded that "there are significant issues of fact that are in dispute as to where he was born, Hawaii as he claims, or outside of the United States and its territories" § 9 (C41)

Having been presented the evidence by investigator Zullo and Dr. Corsi, Sheriff Arpaio concluded that "forgery and fraud was likely committed in key identity documents including President Obama's long-form birth certificate, his Selective Service Card, and his Social Security Number." Arpaio Affidavit, § 7 (C 39)

Sheriff Arpaio based his conclusions on indications that "President Obama's long-form birth certificate is a computer-generated document, was manufactured electronically, and it did not originate in a paper format, as claimed by The White House." § 8 Id.

In summary, Sheriff Arpaio unequivocally stated that "there is probable cause that the document is a forgery, and therefore it cannot be used as a verification, legal or otherwise, of the date, place or circumstance of Barack Obama's birth." *Id.*[1]

With this strong evidence of fraud coming from the Sheriff of Maricopa County Arizona, an official source as provided in the Alabama Attorney General's opinion, it is certainly reasonable to require the Secretary of State to demand from Obama a bona fide birth certificate.

3. All the elements necessary for the issuance of a writ of mandamus are present.

> Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995).

Petitioners address each of these elements in turn.

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[1] Apart from the question of the legitimacy of Obama's birth certificate there is a distinct but related question: Obama himself acknowledges that his father is Barack Obama, Sr., who was born in what is today Kenya but at the time was a part of British East Africa, thus making Obama the elder a British subject. This, then, would seem to mean that Obama Jr. was not a natural-born American, since he was not born to two U. S. citizen parents.

(1) A clear legal right to the order sought:

Appellants have a clear legal right to the order sought. McInnish is a citizen of Alabama and of the United States. He is a registered voter who voted in the 2012 general election. He pays each year all the numerous taxes he owes, which typically include income taxes, real estate taxes, and sales taxes, among others. Further, he is burdened with his share of the national debt.[2]

McInnish has a manifest interest in the maintenance of lawful, constitutional government, in that it is vital to the wellbeing of himself, his progeny, and his property. He certainly has a clear legal right to have the state's chief elections officer perform her duties to ensure honest elections in furtherance of maintaining a stable, constitutional government.

Goode is a citizen of Virginia and of the United States. He was a candidate for the Office of President of

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[2] The national debt stands at approximately $17.7 trillion. See http://www.usdebtclock.org/ In July 2011, the Census Bureau reported the population of the United States to be 311.6 million. See http://www.census.gov/newsroom/releases/archives/population/cb11-215.html/

The arithmetic yields a debt of $53,719 for every man, woman, and child.

the United States for the Constitution Party in the 2012 presidential election, and had an interest in a fair election contest for the office of President of the United States. Being compelled to compete for said office against candidates who may not be eligible for the office denies Mr. Goode his right to run against only qualified candidates. Even though the election was concluded he still suffered irreparable injury as a candidate for the office of President since he was prevented from competing on an equal playing field, and he also has a direct and personal interest in having the historical record accurately recorded. Should the votes of any ineligible candidates be included in the tally that would not be the case. *See Hollander v. McCain,* 566 F.Supp.2d 63,68 (D.N.H. 2008)

(2) An Imperative duty upon the respondent to perform, accompanied by a refusal to do so.

The Secretary of State is responsible for overseeing all elections (Code of Ala. § 17-1-3(a)), and the printing of ballots, in the State of Alabama. Code of Ala. 1975 §17-14-20, et seq. The imperative duty of the Secretary of State of Alabama stems from the oath of office that she took at the time she assumed office:

> I, ..., solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God." Ala. Const. of 1901, art. XVI, §279, cl. 1.

Further, Ala. Code 1975 §17-9-3 instructs the Secretary of State as follows: "(a) The following persons shall be entitled to have their names printed on the appropriate ballot for the general election, *provided they are otherwise qualified* for the office they seek...." (Emphasis added.) (Those so entitled are then listed, e.g., those certified by their respective parties.)

"[P]rovided they are otherwise qualified" is not mere surplusage added at whim by the Legislature, but was included in the law for a substantive purpose. By allowing only those who are "otherwise qualified" to appear on the ballot, the statute clearly implies that there will be those who seek office who are not qualified, and such persons are not entitled, nor even permitted, to have their names on the ballot.

This phrase makes clear that the lawmakers were anticipating that names might be submitted to the Secretary of State which were legitimate *prima facie*, but not legitimate *de facto*, and that such as these should not be allowed on the ballot by the state's chief elections official.

The U.S. Constitution, which the Secretary of State has taken an oath to uphold, provides a specific set of requirements for one to be eligible for the Office of President of the United States. As the Supreme Court has clarified, "...the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). The states may not in any way alter the eligibility requirements mandated by the Constitution.

The oath of office is the common root from which the three branches of government spring. It is so vital to our form of government that Justice Marshall cited the Supreme Court Justices' oath as the grounds for establishing

judicial review. *Marbury v. Madison*, 5 U.S. 137. In fidelity to her oath of office, *supra*, in which she swore (or affirmed) that she would "...support... the Constitution of the State of Alabama...," and in view of the instructions contained in Ala. Code 1975 §17-9-3, *supra*, codified in law under the Alabama Constitution, the Secretary of State has an imperative duty to determine whether the candidates meet the Constitutional requirements for the Presidency and are eligible for placement on the ballot. This is certainly true in the case of a would-be candidate about whom there is credible doubt concerning his qualifications for the office sought.

The Secretary of State, acting on behalf of the State of Alabama, must, of course, obey the U.S. Constitution. "It would be superfluous to restate all the occasions on which this Court has imposed upon state officials a duty to obey the requirements of the Constitution, or compelled the performance of such duties; it may suffice to refer to *Brown* v. *Board of Education*, 349 U.S. 294 (1955), and *Cooper* v. *Aaron*, 358 U.S. 1 (1958)." *Puerto Rico v.Branstad*, 483 U.S. at 228. If the Secretary of State allows an ineligible person to run for the Office of

President of the United States it would be in direct violation of the U.S. Constitution. This outcome cannot be allowed.

Yet on February 2, 2012, Appellant McInnish, together with his attorney and others, visited the Office of the Secretary of State, during which meeting the Hon. Emily Thompson, Deputy Secretary of State, speaking in the absence of and for the Secretary of State, represented that her office would not investigate the legitimacy of any candidate, thus violating her duties under the U.S. and Alabama Constitutions. It is clear that the Secretary of State is unlawfully refusing to perform her constitutional duty and must therefore be ordered to do so.

(3) Lack of Another Adequate Remedy

Alabama's Election Contest statutes, Ala. Code 1975 § 17-9-3 *et. seq*, govern only an enumerated list of elected offices that may be contested. This statute allows for challenges to all Alabama state officers, as well as those elected to the judiciary in the state. This statute does not mention any federal office, and specifically does not mention the Office of President of the United States. Ala. Code § 17-16-44 further provides:

> No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute.

Thus § 17-9-3 is the only election contest statute, and it does not provide for a contest to the election of the President of the United States. Moreover, Ala Code 1975 §17-16-44 specifically eliminates jurisdiction to challenge other *elections*. Thus, these Alabama statutes do not address the issue of eligibility and there is no other adequate remedy. The Secretary of State is the sole government official who is in a position to interdict the name of an illegitimate candidate and exclude it from the ballot.

If the Secretary of State failed to perform this duty, it would mean she was violating the highest law of this land, the U.S. Constitution. It would also mean that a wrong of the most serious sort would go unattended, namely one or more persons about whom there were legitimate questions concerning their eligibility for the Office of President of the United States would be placed on the ballot -- and possibly even elected for that office -- without being eligible to hold it.

But equity demands that for every wrong there be a remedy. In this instance the obvious remedy is an extraordinarily simple one. It is to require each candidate to do what every teenager is required to do to get a learner's permit. It is to produce a *bona fide* birth certificate, Ala. Code 1975 §32-6-8(b) and the Secretary of State is the official to cause that to happen.

(4) Properly Invoked Jurisdiction of the Court

Circuit courts have original jurisdiction to hear cases involving mandamus pursuant to Ala. Code 1975 §6-6-640. *See e.g. Ex parte Collins*, 84 So. 3d 48, 50 (Ala. 2010).

4. Ala. Code 1975 §17-16-44 Does Not Bar This Action.

The aforementioned Ala. Code 1975, §17-16-44 provides:

> "No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute."

In the case of *Rice v. Chapman*, 51 So. 3d 281(2010) the Alabama Supreme Court invoked Code of Ala. 1975 §17-16-44,

the so-called "jurisdiction stripping statute," and concluded that it had no jurisdiction to hear the lawsuit. In *Rice*, the plaintiff sought to prevent the Republican Party from canvassing votes cast for a possibly ineligible candidate who had allegedly not timely qualified. The Alabama Supreme Court found that the prevention of a party from canvassing votes would "impact the 'conduct'" of the Republican Primary election, one of the specifically prohibited actions. It was for this reason that the Court found that §17-16-44 stripped the Court from having subject matter jurisdiction.

Yet it is only the proceedings that entertain the "legality, conduct, or results of any election" that §17-16-44 prevents. Unlike *Rice*, this lawsuit does not seek to question the legality of the election, nor does it impact the "conduct" of the election, nor does it contest the results of an election. Rather this lawsuit is about the eligibility of those seeking to participate in the election and the duty of the Secretary of State to determine the eligibility of those attempting to participate. Thus, none of the prohibited actions of §17-16-44 are implicated by

this lawsuit and this lawsuit is not barred by that statute.

Further § 17-16-44 does not preempt the U. S. Constitution in its demands made on a candidate for the office of President of the United States.

CONCLUSION

It would be paradoxical beyond measure if the real and grave question of the legitimacy of the *de facto* President, a question which lies at the very heart of our American Constitutional Government, were left unresolved for want of the simplest of documents, a birth certificate. As explained *supra,* a teenager applying for a learner's license must submit an original, *bona fide* birth certificate. The same is true for a Boy Scout before he joins a troop. Could any clever excuse, any artful words, any sleight of hand with computer software, possibly provide an honorable rationale for the Commander-in-Chief to withhold his birth certificate from the view of Alabama citizens, and from the American public?

This honorable Court has at its fingertips the power to resolve this monumental conundrum. By granting Petitioner's request for a Writ of Mandamus it will be

resolved. Either a *bone fide* birth certificate will be simply produced, or it will necessarily be admitted not to exist. Either way, this most important of legal questions will have been answered, the purity of Alabama's ballot maintained, and the anxiety of Alabama citizens stilled.

As recounted *supra*, the Deputy Secretary of State explained that her office was without an investigative means. The remedy called for here, however, requires *no* investigation. It merely requires the production of what purportedly already exists, a very ordinary, commonplace thing: a birth certificate. It requires virtually no expenditure of time or money by the Secretary of State.

A maxim of equity holds that for every wrong there is a remedy. Should the Court not issue the writ here requested, Petitioners, as well as the people of Alabama, would be left without a remedy for the wrong of admitting to the ballot the name of one whose legitimacy is in serious doubt. Nor is it a typical candidate that is in question. He does not seek to be a legislator among others who constitute the Legislative Branch, nor a judge among others who constitute the Judicial Branch. No, he seeks to be the single person who constitutes the Executive Branch,

the President of the United States.

Uncorrected, this would result, not without some justification, in the impression among the citizens that their government was dysfunctional and has ignored their real concerns. And when the governed lose faith in their governors, society can suffer grievously. We urgently ask this honorable Court to grant this writ ordering the Secretary to obtain birth certificates from the candidates for President of the United States for the election which was held in November, 2012, and do the same for all candidates in future presidential elections. If such birth certificates are not forthcoming within 45 days after order of this Court, the votes certified for any candidate not responding should be decertified.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of March 2013, I electronically filed the foregoing with the Clerk of the Supreme Court of Alabama using the ACIS filing system, which will send notification of such filing to the following:

Hon. Luther Strange, Attorney General of Alabama
Margaret L. Fleming
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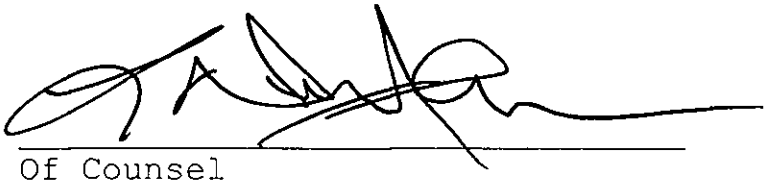

Of Counsel

Case No. 1120465

IN THE SUPREME COURT OF ALABAMA

HUGH MCINNISH, et al.,
Appellants

v.

BETH CHAPMAN, SECRETARY OF STATE
Appellee.

APPEAL FROM THE
CIRCUIT COURT OF MONTGOMERY COUNTY
CV 2012-1053

APPENDICES TO BRIEF OF THE APPELLANTS

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LIST OF APPENDICES

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I HEREBY CERTIFY that on the 26 day of March 2013, I electronically filed a true and correct copy of the Appendices to Brief of the Appellants with the Clerk of the Supreme Court of Alabama using the ACIS filing system, which will send notification of such filing to the following:

Hon. Luther Strange, Attorney General of Alabama
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Of Counsel

AGO 1998-200.

Alabama Attorney General Opinions

1998.

AGO 1998-200.

1998-200

August 12, 1998

Honorable Jim Bennett
Secretary of State
P.O. Box 5616
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Secretary of State - Candidates - Ballots - Political Parties

The Secretary of State does not have an obligation to evaluate all of the qualifications of the nominees of political parties and independent candidates for state offices prior to certifying such nominees and candidates to the probate judges pursuant to sections 17-7-1 and 17-16-40 of the Code of Alabama. If the Secretary of State has knowledge gained from an official source arising from the performance of duties prescribed by law, that a candidate has not met a certifying qualification, the Secretary of State should not certify the candidate.

The law does not prohibit the Secretary of State from informing the probate judges of his or her reason for non-certification.

Dear Mr. Bennett:

This opinion of the Attorney General is issued in response to your request.

QUESTION 1

Does the Secretary of State have the obligation to evaluate any qualifications of the nominees of political parties and independent candidates for state offices prior to certifying such nominees and candidates to the probate judges pursuant to sections 17-7-1 and 17-16-40 of the Code of Alabama?

FACTS AND ANALYSIS

Section 17-16-40 of the Code of Alabama provides: The Secretary of State shall, within 45 days after the second primary election, certify to the probate judge of each county in the state a

separate list of nominees of each party for office and for each candidate who has requested to be an independent candidate and has filed a written petition in accordance with Section 17-7-1(a)(3), except nominees for county offices, to be voted for by the voters of such county. ALA. CODE § 17-16-40 (1995).

Section 17-7-1 provides in pertinent part: (c) The Secretary of State must, not later than 45 days after the second primary, certify to the probate judge of each county in the state, in the case of an officer to be voted for by the electors of the whole state, and to the probate judges of the counties composing the circuit or district in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him or her for that purpose, the fact of nomination or independent candidacy of each nominee or independent candidate or candidate of a party who did not receive more than 20 percent of the entire vote cast in the last general election preceding the primary who has qualified to appear on the general election ballot. . . . ALA. CODE § 17-7-1(c) (1995).

Your question concerns whether the Secretary of State has an obligation to evaluate any qualifications of the nominees for political office. The Code does not require the Secretary of State to determine whether each nominee meets all the qualifications for his or her particular office. Some of the qualifications, however, are within the Secretary of State's official knowledge. By official knowledge I mean knowledge gained from an official source arising from the performance of duties prescribed by law. For example, candidates are required to file statements of economic interest with the Ethics Commission. ALA. CODE § 36-25-15 (Supp. 1997). If the Ethics Commission provides the Secretary of State with formal notice of those candidates who have not filed statements of economic interest, the Secretary of State has official knowledge that the candidates have failed to meet a certifying deadline. Only those candidates meeting the filing requirements are entitled to be on the ballot. ALA. CODE § 36-25-15(c) (Supp. 1997). If the Secretary of State has official knowledge that a candidate has not met a certifying qualification, the Secretary of State should not certify the candidate.

Similarly, section 17-16-40 places a duty on the Secretary of State to certify only those independent candidates who have filed a written petition in accordance with Section 17-7-1(a)(3). The Secretary of State has the duty to ensure that the written petition filed by an independent candidate is in accordance with section 17-7-1(a)(3). This Office has previously determined that the Secretary of State is responsible for verifying signatures on a petition to run as an independent candidate. Opinion to Honorable Perry A. Hand, dated April 19, 1990, A.G. No. 90-00223. Section 17-7-1(a)(3) also requires each independent candidate to file a petition with the Secretary of State on or before 5: 00 p.m. six days after the second primary election. ALA. CODE § 17-7-1(a)(3) (1995). This Office has previously concluded statutes setting the time for filing a certificate of nomination are mandatory. Opinion to Honorable Earlean Isaac, dated July 29, 1998, A.G. No. 98-00194. Whether a petition by an independent candidate fulfills the requirements of section 17-7-1(a)(3) is within the official knowledge of the Secretary of State. Alabama law directs the Secretary of State to certify only independent candidates who have properly filed pursuant to section 17-7-

1(a)(3).

Moreover, candidates who have been put in nomination by a primary election or by a caucus, convention, mass meeting, or other assembly of a political party must meet a statutorily established filing deadline. *See* ALA. CODE § 17-7-1(a)(1) & (2) (1995). If the candidate is required to file with the Secretary of State, it is within the Secretary of State's official knowledge as to whether the deadline was met. As stated above, if the Secretary of State has official knowledge that a candidate has not met a certifying qualification, the Secretary of State should not certify the candidate.

CONCLUSION

The Secretary of State does not have an obligation to evaluate all of the qualifications of the nominees of political parties and independent candidates for state offices prior to certifying such nominees and candidates to the probate judges pursuant to sections 17-7-1 and 17-16-40 of the Code of Alabama. If the Secretary of State has knowledge gained from an official source arising from the performance of duties prescribed by law, that a candidate has not met a certifying qualification, the Secretary of State should not certify the candidate.

QUESTION 2

If the answer to question #1 is in the affirmative, is it permissible for the Secretary of State to also notify the probate judges of the disqualification of those nominees of political parties and independent candidates for state office which have been determined to be disqualified and set out the reason for disqualification in order for the probate judges to be informed of the basis of the Secretary of State's decision in those instances?

FACTS, ANALYSIS, & CONCLUSION

As stated above, the Secretary of State should not certify a candidate when he has official knowledge that the candidate is not entitled to be on the ballot. The law does not prohibit the Secretary of State from informing the probate judges of his or her reason for non-certification.

QUESTION 3

If the answer to question #1 is in the affirmative, is the obligation to evaluate qualifications limited to a ministerial review based upon the facts within the Secretary of State's possession, or does it also extend to an obligation to investigate factual allegations concerning the qualifications of candidates for state offices?

FACTS, ANALYSIS, & CONCLUSION

As stated above, the Code does not require the Secretary of State to determine whether each nominee meets all the qualifications for his or her particular office. The Secretary of State does have an obligation to review qualifications based on facts within his official knowledge.

QUESTION 4

If the answer to question #1 is in the affirmative and the answer to question #3 provides a fact-finding obligation for the Secretary of State in reviewing the qualifications of candidates for state offices, is the investigation of factual allegations a judicial obligation of the Secretary of State requiring due process of law or an extension of the Secretary of State's ministerial duty?

FACTS, ANALYSIS, & CONCLUSION

As stated in question 3, the Secretary of State has no duty to investigate facts not within his official knowledge; therefore, this question need not be addressed.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

BILL PRYOR

Attorney General

By: JAMES R. SOLOMON, JR.

Chief, Opinions Division

BP/WBM

B7.98/M

823 So.2d 679 (Ala. 2001)

Nelson Allen,

v.

Jim Bennett, as Secretary of State of the State of Alabama.

1992289.

Supreme Court of Alabama.

December 28, 2001.

Page 680

Joseph W. Hudson, Jasper, for appellant.

Bill Pryor, atty. gen., and Charles Brinsfield Camphell and William P. Clliford III, asst.attys. gen., for Appellees Secretary of state, Jim Bennett.

Algert S. Agricola, Jr., of Wallace, Jordan, Ratliff & Brandt, L.L.C., Montgomery, for appellee don Bervill.

BROWN, Justice.

Nelson Allen appeals from a judgment in an action filed by Jim Bennett, as Secretary of State of the State of Alabama, declaring, among other things, that Allen should not be certified on the ballot for the November 2000 general election as the Democratic Party candidate for a district court judgeship in Walker County. We affirm.

I.

On December 1, 1999, Judge Warren Laird, Jr., resigned, creating a vacancy in the office of district court judge, place no. 1, in Walker County. Laird had been elected to that office in the November 1996 general election, and his term of office would have expired in January 2003. Governor Don Siegelman appointed Donald H. Bevill to fill the vacancy created by Judge Laird's resignation, and Bevill was sworn in on December 1, 1999.

On March 28, 2000, the Administrative Office of Courts ("AOC") sent a memorandum to the presiding judges in counties in

which a judicial officeholder would be required to run for election. Walker County was one of those counties. The memorandum concluded that, pursuant to 6.14 of Amendment No. 328 to the Alabama Constitution of 1901 and other pertinent constitutional provisions, Judge Bevill's term of office would expire on January 15, 2001, and that the office Judge Bevill occupied should be included among those offices to be filled in the 2000 election. Shortly after the memorandum was issued, Nelson Allen declared his candidacy for the district court judgeship, place no. 1, and filed qualifying papers with the Alabama Democratic Party. Subsequently, Allen, Judge Bevill, and a third person, Jim Wells, qualified to run for the judgeship in the Democratic primary, which was scheduled for June 6, 2000. After Secretary of State Jim Bennett certified the candidates, the names of all three men were placed on the ballot as the Democratic Party candidates for the district court judgeship, and the ballots were printed. In the meantime, however, Judge Bevill had requested a legal opinion from the attorney general as to when his term of office expired and whether the district court judgeship, place no. 1, should, in fact, be placed on the 2000 election ballot.

On May 30, 2000, the attorney general issued an opinion, stating that, under the pertinent constitutional provisions, Judge Bevill's term of office would not, as the AOC had opined, expire in January 2001, but instead would expire in January 2003, and that, therefore, Judge Bevill was not required to run for office in the 2000 election. See Op. Att'y Gen., No. 2000-159 (2000).

However, the names of Bevill, Allen, and Wells were on the printed ballots as the Democratic Party candidates for the place no. 1 district court judgeship in Walker County when the primary election was held on June 6, 2000. Bevill and Allen were the top two Democratic vote-getters, with neither receiving more than 50% of the votes. The two then met in a run-off election, held on June 27, 2000; Allen won the run-off.[1]

Pursuant to 17-7-1(c) and 17-16-40, Ala. Code 1975, Secretary of State Bennett was required, by August 13, 2000, to certify to the probate judge of each county in Alabama the names of the candidates that are to appear on the ballot for the November 2000 general election. On July 7, 2000, in view of the conflicting opinions of the AOC and the attorney general as to the place no. 1 district court judgeship in Walker County and for the accuracy of the general-election ballot, Secretary of State Bennett filed a declaratory-judgment action in the Walker Circuit Court, asking that court to construe the pertinent constitutional provisions and to declare the names of those candidates who should be certified to appear on the ballot for the November 2000 general election. A specific question put to the court by the Secretary of State was: When is Judge Bevill's term of office as district court judge due to expire? After the circuit and district judges of Walker County recused themselves, this Court appointed retired Montgomery Circuit Judge William

Gordon (Judge Gordon is hereinafter referred to as "the circuit court") to preside over the case.

The parties stipulated to the facts of the case. On August 9, 2000, the circuit court entered its judgment, declaring (1) that, pursuant to 6.14 of Amendment No. 328 of the Alabama Constitution of 1901, Judge Bevill's initial term lasts until the first

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Monday after the second Tuesday in January following the next general election after he has completed one year in office; (2) that, accordingly, Judge Bevill's term of office as district court judge, place no. 1, in Walker County does not expire until January 2003; (3) that Judge Bevill was not required to run for the district court judgeship in the 2000 election cycle; and (4) that, for the aforementioned reasons, the Secretary of State should not certify the names of any candidates for the office of district court judge, place no. 1, Walker County, on the November 2000 general-election ballot.

II.

On appeal, Allen contends that the circuit court's construction of the pertinent constitutional provisions is incorrect and that, as the winner of the primary election, he should have been certified as the Democratic Party candidate for the district court judgeship on the November 2000 general-election ballot. Judge Bevill has filed a brief with this Court in which he argues that, because the 2000 general election has been held and the office of the district court judge, place no. 1, was not on the ballot, Allen's appeal presents a moot question and that, therefore, the appeal should be dismissed. However, because the outcome of this case could impact future elections, we hold that the interpretation of 6.14 of Amendment No. 328 in this case and hence this appeal is not moot. See *Griggs v. Bennett*, 710 So.2d 411, 412 n.4 (Ala. 1998), citing *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

III.

Section 6.14 of Amendment No. 328 of the Alabama Constitution of 1901 operates to fill vacancies in judicial offices. Section 6.14 provides:

"The office of a judge shall be vacant if he dies, resigns, retires, or is removed. *Vacancies in any judicial office shall be filled by appointment* by the governor; *however*, vacancies occurring in any judicial office in Jefferson county shall be filled as now provided by amendments 83 and 110 to the Constitution of Alabama of 1901 and *vacancies occurring in* Shelby, Madison, Wilcox, Monroe, Conecuh, Clarke, Washington, Henry, Etowah, *Walker*, Tallapoosa, Pickens, Greene, Tuscaloosa, [or] St. Clair *county shall be filled as provided in the Constitution of 1901 with amendments now or hereafter adopted, or as may be otherwise established by a properly advertised and enacted local law. A judge*, other than a probate judge, *appointed to fill a vacancy, shall serve an initial term*

lasting until the first Monday after the second Tuesday in January following the next general election held after he has completed one year in office. At such election such judicial office shall be filled for a full term of office beginning at the end of the appointed term."

(Emphasis added.)

The proviso in the second sentence of 6.14 applies to judicial vacancies in several specifically listed counties, including Walker County. Allen argues, as he did in the circuit court, that the language in the proviso stating that such vacancies "shall be filled as provided in the Constitution of 1901 with amendments now or hereafter adopted" means that the term of office of a judge who, like Judge Bevill, has been appointed to fill a vacancy in a county specifically listed in 6.14 is governed by 158 of the Constitution of Alabama of 1901.[2] Section 158 provides that a judge filling a vacancy shall serve until the next

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general election following the expiration of six months after the vacancy occurred. If, as Allen urges, Judge Bevill's term of office is governed by 158, Bevill's term was due to expire on January 15, 2001, and the office should have appeared on the November 2000 general-election ballot, with Allen, as the winner of the Democratic Party primary, certified as the Democratic Party's candidate.

Section 158, upon which Allen relies, was part of what was Article VI of the Constitution of Alabama of 1901. However, Amendment No. 328 repealed Article VI and created the Unified Judicial System.[3] See *Hornsby v. Sessions*, 703 So.2d 932, 939 (Ala. 1997). Thus, Amendment No. 328, of which 6.14 is a part, controls in this state. *Id.* See *Hooper v. Siegelman*, 386 So.2d 207, 209-10 (Ala. 1980) (noting that 6.14 has specifically replaced 158). The circuit court rejected Allen's argument that 158 governs the term of office of a judge appointed to fill a vacancy in one of the counties listed in the proviso in 6.14 because, it said, his interpretation violated the principles of constitutional construction. Allen's interpretation, the court said, "would have the court read back into 6.14 a section of old Article VI which amendment 328 repealed in its entirety."

"In searching for the proper construction of a constitutional provision, we must look to the language of that provision." *Hornsby*, supra, 703 So.2d at 939. Nothing in the language of 6.14 suggests that 158 of what was Article VI governs the terms of office of judges appointed to fill vacancies in the counties listed in 6.14. The plain language of the proviso in the second sentence of 6.14 states that judicial vacancies in the listed counties "shall be filled as provided in the Constitution of 1901 with amendments now or hereafter adopted, or as may be otherwise established by a properly advertised and enacted local law." We agree with the circuit court and with the attorney general that the Constitution has now been amended by Amendment No. 328, which amendment, we have stated, repealed Article VI, and with it 158. Under the general provision of 6.14 of Amendment No. 328, vacancies in judicial offices in Alabama "shall be filled

by appointment by the governor." The language that follows that general provision in 6.14 provides that a vacancy in a judicial office in any listed county that has not adopted an alternate process for filling judicial vacancies is also filled by appointment of the governor.[4] By also providing that judicial vacancies

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may be filled as provided in constitutional amendments hereafter "adopted" or "as may be otherwise established by a properly advertised and enacted local law," 6.14 contemplates procedures established by future constitutional amendment or by enactments of the Legislature that could change the process for filling judicial vacancies in one or more of the listed counties.

We also agree with the circuit court and the attorney general that the second sentence of 6.14, which includes the proviso, governs only *the manner* in which a judicial vacancy in one of the listed counties is filled; it does not apply to *the term* of office of a judge appointed to fill such a vacancy. The proviso in the second sentence of 6.14 must be read as only granting the listed counties the authority to establish a different process for filling judicial vacancies, not altering when the term of a person appointed to fill a vacancy ends or when an election to fill the vacancy must be held.[5]

With the exception of Jefferson County and two other counties specifically covered by constitutional amendments adopted subsequent to the adoption of 6.14,[6] the third sentence of 6.14 which provides that a judge appointed to fill a vacancy "shall serve an initial term lasting until the first Monday after the second Tuesday in January following the next general election held after he has completed one year in office" governs the term of office of persons appointed to fill judicial vacancies in Alabama. There is nothing in the third sentence of 6.14 that can be construed as excepting from its operation the counties listed in the proviso in the second sentence of 6.14. This construction of 6.14 is dictated by its language; it also provides for some measure of uniformity in judicial appointees' terms of office.

Allen argues that this Court in *Griggs v. Bennett*, 710 So.2d 411 (Ala. 1998), "implicitly accepted" his interpretation of 6.14 and recognized that 158 of what was Article VI of the Alabama Constitution governs the term of office of a judge appointed to fill a vacancy in a county listed in the proviso. We do not agree. Although the appellants in *Griggs*, like Allen, made the claim that 158 governed the terms of office of judges appointed to fill vacancies in the counties covered by the proviso in 6.14, this Court never reached that claim in *Griggs*, because we found that the vacant judgeship at issue in that case did not occur in a county covered by the proviso. The question presented in *Griggs* was when was a person appointed to fill a vacancy in a circuit court judgeship in the Twentieth Judicial Circuit, which includes both Henry County (a county listed in the proviso in 6.14) and Houston County (a county not listed in the proviso), required to stand for election. We held that a strict construction of the proviso in 6.14 excludes the Twentieth Judicial Circuit from the scope of the proviso's operation,

because Houston County is not a listed county. "When a court is interpreting a proviso, the application of which is in doubt, general canons of construction require that the proviso be strictly construed." *Griggs*, 710 So.2d at 413.

Thus, *Griggs* does not support Allen's argument concerning Judge Bevill's term of office. Although this Court set out the appellants' argument in *Griggs*, we took no position in that case on the continued viability of 158. Notwithstanding Allen's argument and the argument made by the appellants in *Griggs*, this Court has previously recognized that 6.14 has replaced 158 as the general constitutional provision with language governing the term of office of a person appointed to fill a judicial vacancy in Alabama. See *Hooper v. Siegelman*, 386 So.2d 207, 209-10 (Ala. 1980).

Accordingly, we hold that the circuit court correctly determined that Judge Bevill's term of office does not expire until January 2003. Judge Bevill is not required to stand for election until the 2002 election.

IV.

Allen also argues that Secretary of State Bennett should have been equitably estopped from seeking the declaratory judgment because, Allen says, he relied to his detriment on Bennett's certification of his candidacy in the Democratic Party primary and run-off and because, he says, Bennett unreasonably delayed bringing the declaratory-judgment action.

"To establish the essential elements of equitable estoppel, [a party] must show the following:

"(1) That '[t]he person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on;'

"(2) That 'the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon [the] communication;' and

"(3) That 'the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.'"

Lambert v. Mail Handlers Benefit Plan, 682 So.2d 61, 64 (Ala. 1996), quoting *General Electric Credit Corp. v. Strickland Div. of Rebel Lumber Co.*, 437 So.2d 1240, 1243 (Ala. 1983).

This Court has held:

"Equitable estoppel is to be applied against a governmental entity only with extreme caution or

under exceptional circumstances. *First Nat'l Bank of Montgomery v. United States*, 176 F.Supp. 768 (M.D. Ala. 1959), *aff'd*, 285 F.2d 123 (5th Cir. 1961); *Ex parte Fields*, 432 So.2d 1290 (Ala. 1983).

"'Under the settled law, equitable estoppel... must be predicated upon the conduct, language, or the silence of the party against whom it is sought to be invoked. Said conduct, language, or silence must amount to the representation or concealment of a material fact or facts. *The representation must be as to the facts and not as to the law....*'

"'*The doctrine of equitable estoppel is not a bar to the correction... of a mistake of law.*'"

"(Emphasis added [in *Headrick Outdoor Advertising*].) 176 F.Supp. at 772, quoting *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 182, 77 S.Ct. 707, 709, 1 L.Ed. 2d 746 (1957)."

State Highway Dep't v. Headrick Outdoor Adver., Inc., 594 So.2d 1202, 1204-05 (Ala. 1992).

Secretary of State Bennett cannot be estopped from seeking the declaratory judgment in this case. The Secretary of

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State has no authority to certify names for placement on a ballot for an election that, under the pertinent provisions of the Alabama Constitution, is not supposed to be held.

Allen also suggests that the doctrine of equitable estoppel should be applied because, he says, Secretary of State Bennett unreasonably delayed bringing the declaratory-judgment action. However, the undisputed evidence before the circuit court showed that the Secretary of State acted diligently in seeking the declaratory judgment and that he did not unreasonably delay bringing the action.

For the reasons stated above, the circuit court's judgment is due to be, and is hereby, affirmed.

AFFIRMED.

Houston, See, Lyons, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Notes:

[1] Charles R. Stephens, Jr., who was unopposed in the Republican Party primary, was the Republican Party's nominee for the place no. 1 district court judgeship.

[2] Section 158 provides: "Vacancies in the office of any of the justices of the supreme court or judges who hold office by election, or chancellors of this state, shall be filled by appointment by the governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term and until his successor is elected and qualified."

[3] The preamble to Amendment No. 328 states:

"Article VI of the Constitution of Alabama of 1901 as amended, and amendments 317 and 323 thereof, are hereby repealed and in lieu thereof the following article shall be adopted[.]"

[4] Section 6.14 also specifically provides that vacancies occurring in judicial offices in Jefferson County shall be filled as provided by Amendments No. 83 and No. 110 to the Alabama Constitution of 1901. Amendments No. 83 and No. 110 provide an alternate process a commission nominates to the governor three qualified persons, one of whom the governor shall then appoint to fill the vacancy for filling judicial vacancies in the Birmingham Division of the Jefferson Circuit Court. Thus, 6.14 expressly preserves this process. Since the enactment of 6.14, constitutional amendments applicable to Madison, Mobile, and Talladega counties have been adopted, providing for judicial vacancies occurring in those counties to be filled by a nominating-commission process similar to the process used in Jefferson County. See Amendments No. 334, No. 607, No. 408, and No. 615 to the Alabama Constitution of 1901.

[5] As the attorney general stated in Op. Att'y Gen., No. 2000-159 (2000), the proviso contained in the second sentence of 6.14 "allows the named counties to retain the flexibility to provide, by local law, an alternate *appointment* process, such as a judicial nominating commission, for example."

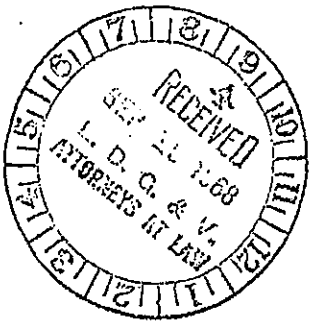
[6] Amendments No. 83, No. 607, and No. 408 of the Alabama Constitution specifically provide that persons filling judicial vacancies in the Jefferson Circuit Court and in circuit and district courts in Madison and Mobile Counties shall serve until the next general election following the expiration of six months after the vacancy occurred.

FRANK M. JORDAN
SECRETARY OF STATE

OFFICE OF THE

Secretary of State

STATE OF CALIFORNIA
SACRAMENTO 95814



September 18, 1968

Mr. Jack Weinberg
350 North Spaulding, Apt. 1
Los Angeles, California 90036

Dear Mr. Weinberg:

To confirm our telephone conversation last Wednesday, September 11th, please be advised that this office will not certify Eldridge Cleaver as the Peace and Freedom candidate for president on the November 5, 1968 general election ballot. Information in our possession indicates, and confirmed by you, that Mr. Cleaver is 33 and not 35 years old which is a requirement under our federal constitution for president. The vice-presidential selection (Peggy Terry) and the 40 electoral college voters will be certified.

Under California law, just the name of the party and its candidates appear on the ballot. The Peace and Freedom party name will appear on the ballot and your candidate for vice-president only.

Sincerely,

FRANK M. JORDAN
Secretary of State

By
H. P. Sullivan
Assistant Secretary of State

HPS/pv/mm

cc: Stuart Weinberg
45 Polk Street
San Francisco, California

State of Arizona)
) ss.
County of Maricopa)

AFFIDAVIT

I, the undersigned, being first duly sworn, do hereby state under oath and under penalty of perjury that the facts are true:

1. I am over the age of 18 and am a resident of Arizona. The information contained in this affidavit is based upon my own personal knowledge and, if called as a witness, could testify competently thereto. I am the duly elected Sheriff of Maricopa County, Arizona, and I have been a law enforcement officer and official, in both state and federal government, for 51 years.

2. In August of last year, a group of citizens from the Surprise Arizona Tea Party organization met with me in my office and presented a petition signed by approximately 250 residents of Maricopa County, asking if I would investigate the controversy surrounding President Barrack Obama's birth certificate authenticity and his eligibility to serve as the President of the United States.

3. This group expressed its concern that, up until that point, no law enforcement agency in the country had ever gone on record indicating that they had either looked into this or that they were willing to do so, citing lack of resources and jurisdictional challenges.

4. The Maricopa County Sheriff's Office is in a rather unique position. Under the Arizona Constitution and Arizona Revised Statutes, as the elected Sheriff of Maricopa County, I have the authority to request the aid of the volunteer posse, located in the county, to assist me in the execution of my duties. Having organized a volunteer posse of approximately 3,000 members, I, as the Sheriff of the Maricopa County Sheriff's Office, can authorize an investigation go forward to answer these questions at virtually no expense to the tax payer.

5. The Cold Case posse agreed to undertake the investigation requested by the 250 citizens of Maricopa County. This posse consists of former police officers and attorneys who have worked investigating the controversy surrounding Barack Obama. The investigation mainly focused on the electronic document that was

presented as President Obama's long form birth certificate to the American people and to citizens of Maricopa County by the White House on April 27, 2011.

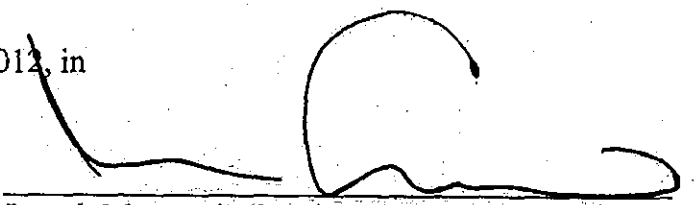
6. The investigation led to a closer examination of the procedures regarding the registration of births at the Hawaii Department of Health and various statements made by Hawaii government officials regarding the Obama birth controversy over the last five years.

7. Upon close examination of the evidence, it is my belief that forgery and fraud was likely committed in key identity documents including President Obama's long-form birth certificate, his Selective Service Registration card, and his Social Security number.

8. My investigators and I believe that President Obama's long-form birth certificate is a computer-generated document, was manufactured electronically, and that it did not originate in a paper format, as claimed by the White House. Most importantly, the "registrar's stamp" in the computer generated document released by the White House and posted on the White House website, may have been imported from another unknown source document. The effect of the stamp not being placed on the document pursuant to state and federal laws means that there is probable cause that the document is a forgery, and therefore, it cannot be used as a verification, legal or otherwise, of the date, place or circumstances of Barack Obama's birth.

9. The Cold Case Posse law enforcement investigation into Barack Obama's birth certificate and his eligibility to be president is on-going. The on-going nature of the investigation is due to additional information that has come to light since we held the press conference in March, 2012. As soon as that information has been properly verified by the Cold Case Posse, I will release that information to the public.

Executed this 12 day of June, 2012, in Maricopa County, Arizona.



Joseph M. Arpaio, Maricopa County Sheriff

Sworn to and subscribed before me this 12th day of June, 2012.

Lynda Jenise Moreno

LYNDA JENISE MORENO
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
January 9, 2016